

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION**

CHINYERE JENKINS, et al.,)	
)	
Plaintiffs,)	
)	
v.)	No. 77-0420-CV-W-1
)	
SCHOOL DISTRICT OF KANSAS)	
CITY, MISSOURI, et al.,)	
)	
Defendants.)	

**SUGGESTIONS IN SUPPORT OF JOINT MOTION
TO ENFORCE JUDGMENTS INCORPORATING
AGREEMENT INVOLVING DISMISSAL OF STATE DEFENDANTS**

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INTRODUCTION

When this Court dismissed the State Defendants (the “State”) in this case on January 28, 1999, it held that the State “must continue to comply with obligations . . . that it undertook during the course of this lawsuit” and warned the State “against taking any actions which might prevent the” Kansas City, Missouri School District (“KCMSD” or the “District”) from meeting its remaining Court-ordered responsibilities. January 28, 1999, Order at 6. Through two separate actions, the State has not only failed to heed this warning, but also directly flouted this Court’s judgments.

The State, principally through two recent statutes, has impermissibly required the District to transfer to charter schools a portion of its property tax levy proceeds that is dedicated pursuant to the orders of this Court to repaying the costs of Court-ordered bonds. Two State administrative agencies and the State Circuit Court have all refused even to consider the State’s obligations under its settlement agreement and this Court’s orders.

Therefore, KCMSD, the class of Plaintiff School Children (“Plaintiffs” or the “Plaintiff School Children”), and intervenor American Federation of Teachers Local 691 (“AFT”) respectfully move this Court to protect its judgments and authority by enjoining both of the State’s actions. Together, KCMSD, the Plaintiff School Children, and the AFT ask this Court to prohibit the State from requiring KCMSD to use any of the per-pupil amount needed to repay the leasehold revenue bonds that it issued to comply with its desegregation obligations in this case for the funding of charter schools or any other purpose. The charter school statute recognized that the State could not require these funds to be used for charter schools, and only recent actions by the State have sought to renege on that agreement and flout the judgments of this Court. See Mo. Rev. Stat. § 160.415.2(5) (“per-pupil amount paid by a school district to a charter school shall be reduced by the amount per pupil needed . . . for repayment of leasehold revenue bonds obligated pursuant to a federal court desegregation action”).

FACTUAL BACKGROUND

I. The Desegregation Bonds And The Levy Increase To Fund Them

During the course of this litigation, the Court held the State and KCMSD jointly and severally liable for the constitutional violation.¹

Moreover, the Court determined both that KCMSD had insufficient revenues to finance its share of the remedial plan required to cure this violation and that certain State laws prevented the District from raising adequate funds to do so. 672 F. Supp. 400, 411 (1987), aff'd in part, rev'd in part, 855 F.2d 1295 (8th Cir. 1988), aff'd in part, rev'd in part, 495 U.S. 33 (1990). The Court, therefore, initially mandated that KCMSD increase its property tax rate, id. at 413, and subsequently “authorize[d] the [District] to submit a proposed levy to the collection authorities adequate to fund its budget, including its share of the cost of the desegregation programs ordered by the [Court],” enjoining State laws to the contrary. 855 F.2d 1295, 1314 (8th Cir. 1988), aff'd in part, rev'd in part, 495 U.S. 33 (1990). As a result, the District’s property tax levy was ultimately increased to \$4.96 per \$100 of assessed valuation. See 158 F.3d 984, 985 (8th Cir. 1998).

The Court also required KCMSD to issue bonds to pay its share of necessary improvements to the District’s decrepit school facilities to cure the constitutional violation. The Court explicitly ordered the District “to issue capital improvement bonds” to finance part of the costs of rehabilitating or replacing buildings that had fallen into disrepair because of the unconstitutional conduct of the State and KCMSD. 672 F. Supp. at 413. But, the Court also made clear that “KCMSD has an obligation not only to eliminate the effects of unlawful segregation but also to insure that there is no diminution in the quality of its regular academic

¹ See 593 F. Supp. 1485, 1505 (1984) (holding that both the State and KCMSD “failed to comply with their constitutional obligations”); 931 F.2d 470, 477 (8th Cir. 1991) (“We entertain no doubt that the district court’s 1985 order based its finding of intradistrict liability on the State’s and KCMSD’s failure to perform a common duty and on an indivisible harm caused by independent separate and concurring torts of two or more tortfeasors. Joint and several liability is, therefore, appropriate.”) (internal citation omitted).

program [I]t is essential that the KCMSD have sufficient revenues to fund an operating budget that can provide quality education.” Id. at 410 (internal citations omitted). Therefore, the Court expressly “earmarked the proceeds of the property tax increase for retirement of capital improvement bonds, with any excess to be used to fund other desegregation costs.” 855 F.2d at 1309. The Eighth Circuit later summarized this sequence of decisions as follows:

The documents authorizing the issuance of the bonds have declared the intention to satisfy the obligation to make payments out of the ‘increase in the property tax levy of \$1.95 per \$100 assessed valuation.’ This was a portion of the additional property taxes that were made possible through the procedure suggested by this court and approved by the Supreme Court, namely that the school board was authorized to set a levy necessary to fund the operation of the school district, including the desegregation funding. . . .

158 F.3d 984, 986.

Over several years, pursuant to the Court’s orders, the District issued three original sets of desegregation bonds that have not yet been fully retired. The first of these was originally issued in the total amount of \$150,000,000 and was ordered in 1987. 672 F. Supp. at 413. The Court later approved \$61 million in additional leasehold revenue bonds to cover KCMSD’s portion of Court-ordered capital improvements. August 18, 1993, Order at 7-9. Again, the “debt-service on the bonds” was explicitly ordered to be paid “from local desegregation revenues.” Id. at 7. Finally, in 1993, at the urging of the Court through its Desegregation Monitoring Committee (“DMC”), the District developed a long-range financial plan to ensure its ability to meet its remaining desegregation obligations, and this plan included approximately \$99 million in additional leasehold revenue bonds to meet the remaining Court-ordered capital requirements. No party, including the State, objected to this proposal, the DMC approved it, and the bonds became critical to the District’s ability to progress toward financial stability and unitary status. Pursuant to this Court’s procedures, when no party appealed the decision of the DMC approving these bonds, the DMC’s action took on the force of a Court order. See May 11,

1988, Order at 1 (“[A]ny decision by the Desegregation Monitoring Committee concerning interpretation of the Court’s orders is only binding if the aggrieved party fails to appeal the decision to this Court in a timely manner.”), aff’d, 890 F.2d 65 (8th Cir. 1989); August 29, 1988, Order at 2 (“[A] DMC interpretation of a Court order is stayed if an appeal, with supporting suggestions, is filed by an aggrieved party within fifteen days of the date the DMC decision was actually rendered.”), aff’d, 890 F.2d 65.

While the District was still under Court supervision, much of the original debt (totaling about \$310,000,000 in principal alone) was repaid, and the bonds also were periodically refinanced to obtain more favorable rates. Such refinancing permitted the District to operate in a fiscally responsible manner that devotes as many resources as possible to schools and classrooms. With this savings, the District also was able to pay a larger portion of the remedial costs in this case than would otherwise have been possible, resulting in significant savings to the State.

This repayment process has continued since the declaration of unitary status in 2003, and the total remaining amount to be repaid on the bonds (principal and interest) as of the start of the last fiscal year (July 1, 2004), for example, was \$187,806,078. See Exhibit A. As of the beginning of this fiscal year (July 1, 2005), the total remaining debt service had been reduced substantially, but remained at \$160,431,743. KCMSD thus retains the Court-ordered obligation to repay these amounts to this day. Moreover, the last of these desegregation bonds will not be fully repaid until 2014.

As a result of this continuing obligation on the District, the State -- which could have been required, under principles of joint and several liability, to pay for all of the capital improvements, including that portion funded by KCMSD’s desegregation bonds -- avoided paying hundreds of millions of dollars.

II. The Settlement And Dismissal Of The State

In 1997, this Court approved an agreement among the State, the District and the intervenor, AFT Local 691, that was objected to by the Plaintiff schoolchildren. 959 F. Supp. 1151 (1997). The agreement provided for the dismissal of the State prior to the full remediation of the constitutional violation upon its payment to the District of \$320 million. See id. at 1169, 1172. The agreement specifically contemplated that KCMSD would invest a substantial portion of these payments for use in future years: “The parties agree that the purpose of the . . . payments by the State to the KCMSD is to provide the KCMSD with a source of funds not only for the next three years, but for future years.” May 21, 1996, Agreement at 5 (attached hereto as Exhibit B). Moreover, the State expressly agreed to support the “tax levy rate set at \$4.96 pursuant to Court Order,” at least until the District was declared unitary. Id. at 7. Plaintiffs believed that even with these conditions, the agreement did not provide enough financial support for the District to be able to meet the educational needs of the schoolchildren and satisfy its remaining desegregation obligations.

Since all of the parties did not agree to this “settlement,” the Court approved the agreement as a modification of its orders, invoking its authority to amend “the terms of an injunctive decree if the circumstances, whether of law or fact, obtained at the time of its issuance have changed, or new ones have since arisen.” 959 F. Supp. at 1172 (quoting System Federation No. 91 v. Wright, 364 U.S. 642, 647 (1961)). Believing that KCMSD could achieve unitary status within three years, and noting that the State’s role in the case had largely been limited to funding the remedy, the Court concluded that “[e]quity require[ed]” this “modification of the earlier remedy prescribed by this Court.” Id.

On appeal, while the Eighth Circuit agreed with Plaintiffs that certain aspects of the agreement were “greatly troubling,” it concluded that this Court had not “abused its discretion” in modifying its orders to allow for “the phase-out of the State’s funding obligation.” 122 F.3d

588, 601, 603 (8th Cir. 1997). The Court of Appeals, however, emphasized several necessary conditions to federal court approval of the agreement. Specifically, the Eighth Circuit noted that “funding for the KCMSD is unquestionably critical.” Id. at 603. The Court of Appeals noted the agreement of the parties that maintaining “the levy at its present level” was necessary not only until the District became unitary, but also as “a means for continued support of the KCMSD independent of court order *after* the KCMSD is no longer under court supervision.” Id. (emphasis added). The Court of Appeals noted that the State already had proposed a constitutional amendment “to allow the KCMSD to maintain the levy at its present level with district voter approval.” Id. Before the State was ultimately dismissed from this case, the State’s voters adopted the amendment, which permits a levy of “up to \$4.95 for \$100 assessed valuation,” one cent below the Court-ordered rate. See 158 F.3d 984, 986; Mo. Const. Art. X, § 11(g).

In analyzing this Court’s modification of its remedial orders based on the agreement between the District and the State, the Eighth Circuit emphasized that the absence of the continued “level of funding under the current levy . . . would present a changed circumstance that could call for reconsideration of the agreement.” 122 F.3d at 603. On this condition, the Eighth Circuit indicated that it would affirm this Court’s approval of the agreement, over the objection of the Plaintiff schoolchildren, as an “exercise of [this Court’s] continuing equitable authority to devise and implement a remedy in this case.” Id. at 604 n.11.

Two years later, after the State had made its final payment to the District under the agreement, it petitioned this Court for an order granting it relief from judgment pursuant to Federal Rule of Civil Procedure 60(b)(5) and dismissing it from the case. The Plaintiff School Children moved the Court to stay its consideration of this request pending a ballot proposal to increase the State sales tax to provide “desegregation replacement” funding. See January 28, 1999, Order at 5. Plaintiffs relied upon the Eighth Circuit’s discussion of adequate funding. Id.

This Court, however, rejected that argument noting that the Court of Appeals had focused specifically on the importance of the Court-approved *local* “levy sufficient to operate the schools.” Id. at 5 n.2. The Court noted that the passage of H.J.R. 9, as discussed above, had ensured that KCMSD’s levy would remain at \$4.95. Id. The Court then dismissed the State but warned that the “State must continue to comply with obligations, if any, that it undertook during the course of this lawsuit.” Id. at 6. In addition, the Court warned the State “against taking any actions which might prevent the KCMSD from” fulfilling its Court-ordered obligations. Id. at 6.

The State acknowledged a clear implication of the Court’s orders that is particularly relevant here: In 1998, the State had enacted legislation authorizing the creation of charter schools. See Mo. Rev. Stat. §§ 160.400-160.420. The State chose to fund charter schools exclusively by diverting federal, State and local education funding, calculated on a per-pupil basis, from KCMSD and St. Louis to any charter schools that were established within their boundaries. Id. § 160.415.2(1). Under the statute, these two school districts pay each charter school in which at least one district student is enrolled “an annual amount equal to the product of the equalized, adjusted operating levy for school purposes for the pupils’ district of residence for the current year times the guaranteed tax base per eligible pupil, . . . times the number of the district’s resident pupils attending the charter school plus all other state aid attributable to such pupils, including summer school, if applicable, and all aid provided pursuant to section 163.031, RSMo [setting forth the formula for state aid to districts].” Id. § 160.415.2(1). “The district of residence of a pupil attending a charter school [must] also pay to the charter school any other federal or state aid that the district receives on account of such child.” Id. § 160.415.2(2).

A 1999 amendment to the Charter Schools Act recognized the fact that a portion of the increased local property-tax levy in KCMSD, as discussed above, was dedicated to repaying the desegregation bonds and that the continued availability of those funds to the District was an express condition of the federal courts’ approval of that agreement. Even if KCMSD students

transferring to charter schools might reduce the District's educational costs by some amount, clearly that amount would not include the fixed costs of bond repayments on capital improvements already completed pursuant to the desegregation orders. The per-pupil amount necessary to repay the bonds would remain the same, regardless of the District's enrollment. Therefore, the Act necessarily provides that:

The per-pupil amount paid by a school district to a charter school shall be reduced by the amount per pupil determined by the state board of education to be needed by the district in the current year for repayment of leasehold revenue bonds obligated pursuant to a federal court desegregation action.

Id. § 160.415.2(5).

Thus, from 1999, when the first charter schools were established within the District, until April 2005, the State authorized the District to withhold from its per-pupil payments to charter schools the amount of its local levy devoted to repayment of the desegregation bonds. The total amount of such withholding approved by the State has from FY 2000 to FY 2005 varied from slightly less than \$4 million to nearly \$6 million depending upon the number of charter school students and KCMSD's debt service schedule.

III. The Board Of Fund Commissioners And Senate Bill 287

In April 2005, the Missouri Board of Fund Commissioners (the "Fund Commissioners"), comprised of the State's Governor, Lieutenant Governor, Attorney General, Auditor, Treasurer and Commissioner of Administration, see Mo. Rev. Stat. § 33.300, took action pursuant to a newly enacted statute. That law, plainly directed uniquely at KCMSD, slipped through the legislative process as an amendment to an agricultural bill, and provides as follows:

The board of fund commissioners shall determine whether any governmental entity has sufficient fund balances to redeem leasehold revenue bonds *obligated under a federal desegregation action*. If the board of fund commissioners determines that any governmental entity has sufficient fund balances to redeem or otherwise pay off such leasehold revenue bonds, the state board of education shall certify, under subdivision (5) of subsection 2 of section 160.415, RSMo, that *no amount is needed by such governmental entity to repay such bonds*.

Mo. Rev. Stat. § 33.315 (emphasis added).

By its terms, the statute called for an analysis that was legally irrelevant given the conditions of the State's dismissal from this case. When the State made its settlement payment to the District, those funds could have been used immediately to "redeem or otherwise pay off" the bonds, but that was never their intended purpose. As discussed above, it was clearly contemplated that the settlement funds would be used at the District's discretion over time and that local and State funding levels must remain adequate for KCMSD to meet its Court-ordered desegregation obligations, including repayment of the bonds. The Charter Schools Act had acknowledged as much, but the Mo. Rev. Stat. § 33.315 simply pretended that this case and this Court had never existed.

Compounding this error, on April 13, 2005, the Fund Commissioners met, without written public notice that they would take up the issue of KCMSD's ability to repay its desegregation bonds. They heard arguments from a charter school advocate seeking additional funding for his clients and also received an analysis by the Department of Elementary and Secondary Education ("DESE"). See Exhibit A. The Fund Commissioners rejected the District's request for an opportunity to present evidence about its fund balances and the relationship of the "determination" called for by Section 33.315 to the State's commitments under this Court's orders approving the agreement and setting forth the conditions necessary to the State's dismissal from this case.

DESE's analysis had correctly concluded that, as discussed above, "all of the current outstanding leasehold revenue bonds issued by the KCMSD were obligated pursuant to a federal court desegregation action." Exhibit A at 4. According to DESE, therefore, "the amount of the outstanding revenue bonds on June 30, 2004 exceeds the June 30, 2004 balance of KCMSD in its capital projects fund." Id. On that basis, DESE recommended that, even under the historical

analysis mandated by the statute, “the Board of Fund Commissioners deny the request submitted [on] behalf of the charter schools.” Id.

While the DESE submission did not mention that KCMSD’s fund balances themselves consist largely of the transition funds received from the State from 1996 to 1999, invested pursuant to the express terms of the 1996 agreement and prudently managed by the District, that fact is well known to the State. Despite this fact and DESE’s recommendation against a determination under Section 33.315, only Attorney General Nixon voted against a motion to “determine” that because of the District’s fund balances that portion of the levy proceeds devoted to repaying the desegregation bonds must instead be paid to charter schools.

Pursuant to Mo. Rev. Stat. § 33.315, the determination of the Fund Commissioners went before the State Board of Education (the “State Board”) on April 22, 2005. KCMSD objected to the determination because, among other reasons, it both ignored DESE’s analysis and would violate the orders of this Court approving the agreement and dismissing the State. The District explicitly warned the State Board that an action “certifying” this determination could result in the reopening of this case. Like the Fund Commissioners, the State Board declined to consider the State’s obligations under this Court’s orders, ignored DESE’s recommendation, and, without discussion, “certified” the determination of the Fund Commissioners. The State Board then directed that withholdings made pursuant to Section 160.415.2(5), Mo. Rev. Stat., be discontinued.

The District immediately appealed this decision in the Circuit Court of Cole County, and that action is pending. However, two events have occurred that give rise to the instant motion despite the pendency of the State litigation. First, on June 29, 2005, the General Assembly enacted Senate Bill 287, 2005 Mo. Legis. Serv. S.B. 287 (West), which includes the outright repeal of Mo. Rev. Stat. § 160.415.2(5) effective July 1, 2006. Therefore, regardless of the outcome of the District’s State-court appeal of the State Board’s April 22, 2005 action, the State

now has directly mandated that the District, as of July 2006, transfer the portion of its levy receipts devoted to the desegregation bonds to charter schools.

Second, at a hearing on July 14, 2005, Judge Thomas B. Brown, III, of the Circuit Court suggested that the State Court did not have jurisdiction to address a claim for breach of contract based on the State's federal court settlement. Judge Brown subsequently dismissed that count (Count II) of KCMSD's complaint without a written opinion. In a July 22, 2005 docket entry, the Judge simply noted the dismissal of that count. In that docket entry, the Court also denied KCMSD's motion for summary judgment on a counterclaim filed by intervening charter schools seeking reimbursement for millions of dollars (approximately \$23,000,000) previously withheld pursuant to Mo. Rev. Stat. § 160.415.2(5). Subsequently, in a September 13, 2005 Order, the Court granted in part and denied in part the charter schools' motion for summary judgment on their counterclaim. See The School District of Kansas City, Missouri v. Missouri Board of Fund Commissioners, et al., No. 05AC-CC00389 (Mo. Cir. Ct. June 22, 2005). Judge Brown, ignoring the settlement in this case and the orders of this Court, found that, because the Department of Elementary and Secondary Education (rather than the State Board of Education itself) had determined each year the amounts to be withheld for the repayment of the desegregation bonds, those amounts had been impermissibly withheld by KCMSD.

Thus, a third Missouri forum refused to consider the State's obligations under its settlement in this case and this Court's orders.

ARGUMENT

I. This Court Has Ancillary Jurisdiction To Enforce Its Orders Approving The Agreement And Dismissing The State

This Court has ancillary jurisdiction to enforce its orders approving the agreement between the defendants in this case and setting forth the conditions of State's dismissal. See Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375 (1994) (discussing "ancillary jurisdiction" but finding no such jurisdiction over agreement not incorporated in a court order);

Schaefer Fan Co., Inc., v. J & D Manufacturing, 265 F.3d 1282, 1286 (Fed. Cir. 2001) (ancillary jurisdiction exists if the parties' obligation to comply with agreement is made part of the order of dismissal); Halderman v. Pennhurst State School & Hospital, 901 F.2d 311 (3d Cir. 1990), cert. denied, 498 U.S. 850 (1990) (entering order enforcing settlement agreement six years after cessation of jurisdiction because agreement was incorporated in court order).²

According to the Supreme Court, among the reasons that federal courts may properly invoke their ancillary jurisdiction is “to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees.” Kokkonen, 511 U.S. at 379-80. Here, the State's recent actions have “flouted” and “imperiled” this Court's mandates, violating the terms of the agreement incorporated in its orders and the Court's conditions of its dismissal order. Therefore, these actions call for the exercise of such jurisdiction. See id. at 380. The State Board's administrative ruling under Mo. Rev. Stat. § 33.315 and the State's subsequent enactment of Senate Bill 287 impede KCMSD's ability to satisfy its obligation to retire the bonds that it issued for purposes of complying with this Court's orders. The State, moreover, has forced KCMSD to pay charter schools that portion of its property tax levy that both the State and this Court have recognized as necessarily dedicated to the repayment of the District's desegregation bonds. Consequently, the Court's enforcement of its orders would serve to “vindicate its authority” and “effectuate its decrees.” See id.

For this reason, the breach of an agreement that is incorporated into an order of dismissal gives rise to ancillary jurisdiction because the breach constitutes not merely a breach of contract enforceable in State Court, but also “a violation of the [court's] order.” Id. at 381; see also, e.g., Harbor Venture, Inc. v. Nichols, 934 F. Supp. 322, 323 (E.D. Mo. 1996) (“[T]his Court has the inherent power that is, automatic ancillary jurisdiction to enforce an agreement when the terms

² The fact that KCMSD is unitary is not relevant to the question whether the Court has jurisdiction over this joint motion to enforce the Court's orders. This motion relates to the 1996 agreement and conditions leading to the State's (not KCMSD's) dismissal from the case.

of the settlement have been included in the decree.”). Such jurisdiction “includes the [Court’s] authority to ‘interpret and enforce its judgment.’” Harbor Venture, 934 F. Supp. at 323 (quoting Lucille v. City of Chicago, 31 F.3d 546, 548 (7th Cir. 1994)).

In this instance, the Circuit Court of Cole County has already indicated that it does not have jurisdiction to hear a breach-of-contract claim aimed at enforcing the agreement by which the State attained its dismissal from this case. This Court does have such jurisdiction, however, because the agreement both was incorporated in this Court’s orders and remains deeply enmeshed in the long and complex history of this case. It is vital for this Court to exercise that jurisdiction, or KCMSD, Plaintiffs, and the AFT may be left with no forum in which to seek a remedy for the State’s actions to remove funds that are dedicated to the continuing payment of the bonds ordered in this litigation.

The Court not only incorporated the agreement between KCMSD and the State into its March 25, 1997 Order, 959 F. Supp. 1151, and January 28, 1999 Order (over Plaintiffs’ objections) but also specified further conditions that were necessary to its approval and to the subsequent dismissal of the State. First, in approving the agreement, the Court permitted the State’s release from further liability for its constitutional violations upon satisfaction of the payment obligations set forth in the agreement. See 959 F. Supp. at 1152. Concluding that “any remaining obligation of the State to the school children of Kansas City [could] be discharged by the payment of the funds provided for in the Agreement,” the Court “modified” its own finding of “joint and several liability” to reflect the State’s release (upon payment of \$320 million to the School District) and KCMSD’s resulting “individual liability.” Id. at 1172; see also 122 F.3d at 599 (noting the district court’s “broad equitable authority to modify the remedy [in a desegregation case] as it deems necessary”).³

³ This “modification of the earlier remedy prescribed by this court,” 959 F. Supp. at 1172, entered after considering and rejecting Plaintiffs’ objections to it, clearly distinguishes this case from those in which a court merely reviews, acknowledges, and approves a settlement agreement reached by the parties. For example, in Kokkonen, the Supreme Court noted that “mere awareness and approval of the terms of the settlement agreement do not suffice to make them

The Eighth Circuit took a similar view when it affirmed this Court's approval of the agreement. Rejecting the class of Plaintiff schoolchildren's objections to the State's release from joint and several liability upon payment of \$320 million, the Eighth Circuit observed:

The Class analogizes the agreement to a contract and contends that it cannot be bound by a contract to which it is not a party. Regardless of the agreement, the district court's order is not akin to a contract. The Class presented its objections to the district court, those objections were overruled, and the Class is now bound by that order *to the same extent as any other court order in this case*.

122 F.3d at 604 n.11 (emphasis added).

Indeed, this Court itself later expressly stated that it had approved the agreement as part of a modified judicial order rather than mere acceptance of a settlement agreement. See October 2, 1997 Order at 7-8, rev'd on other grounds, 158 F.3d 980. The Court described the modification of its "original remedial injunction" as "similar to a consent decree," which it defined as "a negotiated settlement of a case *enforced through the court's inherent power to enforce its own equitable decrees or orders.*" Id. at 5-6 (emphasis added). The Court further observed that the "peculiar" nature of the modification set it apart from "the traditional hybrid consent decree" in certain important respects. Id. at 6-7. In particular, the Court emphasized that the modification occurred "after an adjudication on the merits," that it was entered without Plaintiffs' consent, and that "satisfaction of the terms of the agreement [would] not necessarily end the case or the State's liability." Id. at 6-7. In light of these circumstances, the Court interpreted the "court-approved agreement as a judicial decree, not a contract." Id. at 7.

Moreover, both this Court and the Eighth Circuit specified additional conditions that were necessary to the approval of the agreement and the State's subsequent dismissal. These

part of the order." 511 U.S. at 381. Likewise, the Eighth Circuit, in Miener v. Missouri Department of Mental Health, 62 F.3d 1126 (8th Cir. 1995), noted that "mere reference to the fact of settlement does not incorporate" the agreement in an order. Id. at 1128. In striking contrast, here the agreement could not be approved without its modification and incorporation in an order because one of the parties objected to it. Moreover, in this case, both this Court and the Eighth Circuit did far more than merely acknowledge the agreement; rather, both courts probed deeply the implications of the agreement in terms of the long history of this case, its ultimate resolution and the conditions of the parties once active court supervision ended.

conditions included sufficient funding of KCMSD, and, specifically, maintenance of the \$4.95 levy. See 122 F.3d at 603 (“Sufficient funding is absolutely essential to the school district’s continued viability.”); January 28, 1999 Order at 5 n.2 (concerns related to the “future funding” of KCMSD “have been addressed and eliminated by passage of H.J.R. 9, which ensures that the levy would remain at \$4.95 per \$100”).

The Court of Appeals, in addition, expressly stated that a “loss of the level of funding under the current levy would be catastrophic” for KCMSD and “would present a changed circumstance that could call for reconsideration of the agreement.” 122 F.3d at 603; see also 158 F.3d 984, 986 (“Should the KCMSD fail to provide sufficient funding to cover retirement of the bonds or other obligations, the aggrieved parties can seek appropriate relief.”). In addition, this Court’s language warning the State “against taking any actions which might prevent the KCMSD from” fulfilling its Court-ordered obligations reflected the Court’s understanding that it would have jurisdiction to enforce the terms of its order of dismissal, if necessary. January 28, 1999 Order at 6. See Schaefer Fan, 265 F.3d at 1287 (there is “no magic form of words” to effect a valid incorporation, but “the court need only manifest its intent to retain jurisdiction”).

The Court, therefore, has ancillary jurisdiction to enforce its orders approving the agreement and setting forth the conditions of the State’s dismissal.

II. This Court Should Enjoin The State From Requiring The District To Transfer To Charter Schools The Per-Pupil Amount Necessary To Repay The Bonds Obligated Pursuant To This Case

Court approval of the 1999 dismissal of the State was conditioned upon the continuation of the \$4.95 levy in KCMSD, the District’s freedom to manage the transition funds from the State, and the State’s non-interference with KCMSD’s performance of its obligations, including repayment of the desegregation bonds. The State’s recent actions in requiring the District prospectively to pay the portion of its levy dedicated to repaying the desegregation bonds to

charter schools (and potentially requiring the direct transfer of settlement funds in order to “make-up” for past withholdings) thus violate the orders of this Court.

In 1999, the State recognized that its dismissal pursuant to the agreement, as approved by the Court, was subject to these conditions: The State expressly acknowledged its obligation to allow the District to withhold from the per-pupil amount paid to charter schools the funds needed by the District “for repayment of leasehold revenue bonds obligated pursuant to a federal court desegregation action.” Mo. Rev. Stat. § 160.415.2(5). In dismissing the State, this Court, moreover, had ordered the State to comply with obligations, such as this, that it had undertaken during the course of the lawsuit and ordered the State not to take any “actions which might prevent the” District from meeting its remaining Court-ordered responsibilities, such as repayment of the bonds. January 28, 1999 Order at 6. By first attempting to side-step the obligation recognized in Section 160.415.2(5) (through the application of Mo. Rev. State § 33.315), and then by repealing Section 160.415.2(5) (through the enactment of Senate Bill 287), the State is failing to comply with this Court’s orders. Missouri has many possible ways at its disposal to fund charter schools, but raiding KCMSD levy proceeds dedicated to the desegregation bonds or the settlement funds provided in this case are not among the State’s legitimate options.⁴

The impact on the District of the State’s violation of the terms of its dismissal, moreover, is severe. Assuming that charter school enrollment remains constant, nearly \$58 million are potentially at stake. The dismissal of the State based upon payment of \$320 million clearly would not have been agreed to by KCMSD nor approved by the Court if the State had retained the right to transfer tens of millions of dollars from the District’s local property-tax levy increase from repayment of the desegregation bonds to the support of charter schools (or any other State

⁴ Both DESE and the Attorney General, the State actors with the most familiarity with this case, its history and ongoing implications, opposed the actions in question.

designated purpose). Indeed, this Court expressly warned the State not to take any actions that would prevent KCMSD from meeting its Court-ordered obligations. Id.

The State is effectively attempting to reclaim indirectly a substantial portion of the funds it gave the KCMSD in return for its early dismissal from this case. By requiring the District to pay over to charter schools part of the local tax levy that is dedicated to debt service on bonds that this Court required KCMSD to issue to pay its share of capital improvement costs, the State will leave the District no choice but to use funds it holds in reserve from the State's transition payments to cover its debt service obligations. Indeed, Mo. Rev. Stat. § 33.315 states as the test of whether the District must pay part of its debt service money to the charter schools whether KCMSD has sufficient funds in its reserves, i.e., whether it has prudently retained funds from the State settlement.

Requiring the District to use the per-pupil amount of the levy increase devoted to the Court-ordered capital improvement bonds to fund charter schools also is fundamentally unfair because the charter schools obviously do not have to pay debt service on KCMSD's bonds. Yet, KCMSD's debt service payments, arising out of the orders of this Court, do not diminish by a nickel because a child who lives in the District goes to a charter school. The Court's orders are binding, the bonds have been issued, and the buildings have been built or improved. The State is free, of course, to provide additional funding for charter schools itself through virtually any means it chooses. It is not free to redirect the dedicated proceeds of the levy increase without violating the orders of this Court.

The Court, therefore, should prohibit the State from requiring KCMSD to transfer to charter schools or to use for any other purpose the per-pupil amounts necessary for the District to satisfy its repayment obligations on the desegregation bonds originally obligated pursuant to this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was sent by Federal Express, overnight delivery, this 22nd day of February 2006 to:

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